IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	MDL No. 2724 Case No. 2:16-MD-02724
THIS DOCUMENT RELATES TO: *ALL ACTIONS*	Hon. Cynthia M. Rufe

CERTAIN DEFENDANTS' SUR-REPLY IN RESPONSE TO UNITED STATES' MOTION TO CLARIFY OR, IN THE ALTERNATIVE, AMEND THE MODIFIED PROTECTIVE ORDER

The Department of Justice's ("DOJ") Reply in Support of United States' Motion to Clarify or Amend the Modified Protective Order ("Reply") provides no colorable basis for granting the extraordinary relief the DOJ seeks. Rather, the Reply underscores the impropriety of the DOJ's request and just how disruptive granting the DOJ's motion would be to this MDL.

First, the DOJ's Reply demonstrates the extent to which the DOJ misunderstands Federal Rule of Criminal Procedure 17's ("Rule 17") purpose: "Rule 17 is not a panacea, and relying on it here presents more problems than solutions." ECF No. 2399 at 4. Indeed, Rule 17 is not a "panacea." It is a carefully crafted rule that exists to ensure a criminal defendant's substantive due process rights are respected, while allowing the government access to tailored discovery it needs to prosecute its case. This discovery includes the prior statements of trial witnesses. *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980) ("[R]ule 17(c) permits a party to subpoena . . . prior statements of the witness.").

The DOJ's view that it is inconvenient here to seek discovery under Federal Rules of Criminal Procedure is of no consequence. *Cuthbertson* is the established law of this Circuit and

one need go no further than its facts to understand why the DOJ's complaints here are misguided. In *Cuthbertson*, the initial Rule 17 subpoena was served a month before trial. The trial court confronted the arguments made on a motion to quash "immediately instead of waiting for the trial . . . to afford an opportunity to obtain appellate review of the court's [] decision before the start of the trial." *Cuthbertson*, 630 F.2d at 143. Criminal trial courts regularly address discovery issues under Rule 17 in a way that allows criminal trials to proceed efficiently. The DOJ's hollow claim that seeking witnesses' prior sworn statements via Rule 17 would present "extraordinary challenges and would cause lengthy delays" ignores the common, sanctioned practice in this Circuit and in federal trial courts around the country. ECF No. 2399 at 4.

Furthermore, the DOJ claims that Defendants' "invocation of Rule 17 is a red herring," merely a "more burdensome" "alternative" to procuring discovery in a criminal case. *Id.* at 5. At its core, the DOJ's argument is that forcing it to obtain materials in relation to *criminal cases* via the *criminal rules*, which preserve the ability of criminal defendants and third parties to object prior to the disclosure of information, poses some undescribed "burden" on it. But Rule 17—and the provisions of the Protective Order that would be triggered by a Rule 17 subpoena—exist to protect the rights of criminal defendants and third parties alike, and to ensure that the court overseeing the criminal cases decides what post-indictment discovery the DOJ should obtain. In other words, the only "burden" the DOJ is facing here is the burden in complying with the law.

DOJ does not cite any case supporting its position that Rule 17 and the rights it protects can be ignored. Instead, the DOJ only cites two cases involving *civil litigants*, neither of which apply here. In *United Nuclear Corp. v. Cranford Ins. Co.*, the court held that, "[W]here an appropriate modification of a protective order can place ***private*** litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only

where it would tangibly prejudice substantial rights of the party opposing modification." 905 F.2d 1424, 1428 (10th Cir. 1990) (citation omitted) (emphasis added). This reasoning makes sense for private litigants in civil cases who are not parties to a criminal case and cannot seek discovery via the Federal Rules of Criminal Procedure. The same principle does not make sense here, where DOJ is seeking civil discovery to use in criminal cases that DOJ itself has brought. The DOJ's reliance on *In re Application of Hill*, No. M19-117(RJH), 05CV999996, 2007 WL 1226141 (S.D.N.Y. Apr. 23, 2007) is similarly misplaced. There, the court found that the private litigants resisting intervention demonstrated no prejudice in providing access to discovery they were already producing when the alternative was to force the intervenor to get discovery from a foreign jurisdiction. The DOJ cannot credibly claim that use of Rule 17 to seek deposition transcripts from a civil proceeding in a U.S. court imposes the same burdens as seeking foreign discovery.

Indeed, it is telling that the DOJ has not cited a single case in which a civil court has substituted its judgment for Criminal Rule 17 and that of a criminal court in order to provide the prosecution with post-indictment discovery in advance of a criminal trial. The DOJ's attempt to do just that here is particularly troubling, as the DOJ does not even specify which transcripts it wants to use in the criminal cases. Nor could it, at this stage, given that the parties in the criminal cases have not even exchanged witness lists at this point. Rather, the DOJ relies on a general assumption that unnamed civil deponents will perjure themselves, offers no basis to support that assumption, and then questions why such a bold supposition by a prosecutor may cause a witness to decline to testify at all.

Second, the DOJ indecorously glides past the prejudice articulated by Defendants in their Opposition by simplistically stating that "the word 'prejudice' is nowhere to be found in the defendants' ten-page opposition." ECF No. 2399 at 2. As plainly stated in the Opposition and

above, Rule 17 exists to protect the substantive due process rights of criminal defendants. It also ensures that the DOJ's ability to obtain post-indictment discovery in a criminal case is ruled on by the Judge presiding over that case. Allowing the DOJ to circumvent Rule 17 runs afoul of those rights and procedures and ignores established law in this Circuit. *See Cuthbertson*, 630 F.2d at 144. This is dispositive.

Moreover, the DOJ ignores that its request implicates the rights of dozens of other corporate entities and individuals, all of whom will lose their ability to object to the use of their discovery or, candidly, to even know that their discovery is being used in a criminal case in which they have not been charged. ECF No. 2390 at 2, 5. Allowing the DOJ access to MDL discovery will, at a minimum, nullify the procedural protections currently in place under the Protective Order. Parties and individuals will have no knowledge that their information is being used by the DOJ, much less how and why it is being used, and they will have no way to object to such use. Instead of addressing these arguments, the DOJ continues to cite to inapposite cases that do not support the relief the DOJ seeks. *See In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 333, 339 (E.D. Pa. 2004) (discussing the standard for permissive intervention and interpretations of Federal Rule of Civil Procedure 24 (b)); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131-32 (9th Cir. 2003) (applying Federal Rule of Civil Procedure 26 to private intervenors seeking a protective order to obtain access to discovery); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) (allowing private litigant to intervene but remanding without ruling on proposed modification of confidentiality order). Each of these cases involves private litigants and circumstances completely different than those before this Court.[1]

[1] Furthermore, after relying on numerous grand jury cases in its opening papers, the DOJ now claims that it is not seeking access to the materials in question in order to further any criminal investigation, and that it "has taken steps to stay civil discovery since 2017." ECF No. 2399 at 2. What the DOJ has taken steps to do since 2017 is limit

Third, the DOJ continues to minimize the impact of the relief it seeks, claiming, "[t]he United States has merely asked the Court for permission to use . . . deposition transcripts in the Criminal Prosecutions so that it may protect the integrity of the criminal process, by ensuring the accuracy and clarity of witness testimony." ECF No. 2399 at 3. Although the DOJ asserts that it needs the civil deposition transcripts to hold witnesses who testify in the criminal case accountable, it offers no explanation for why this need justifies access to the civil deposition transcripts of all witnesses in the MDL, who far outnumber those unnamed witnesses who may testify in the criminal trials. The absence of any justification supports the continued Protective Order restriction on the use of the civil deposition transcripts outside the MDL. The DOJ's unfounded position that witnesses will certainly lie during MDL depositions can only have a chilling effect on MDL discovery. When the government tells witnesses in a pending civil case that it needs access to all their upcoming, protected depositions because it expects them to lie, without providing any basis for such an expectation, the effect can only be to create pressure on witnesses in advance of their depositions. Under such circumstances, it is not unreasonable for a witness to choose to assert their Fifth Amendment rights out of fear that zealous prosecutors, who have already formed their view of the facts, will disagree with a witness's honest testimony under oath.

Finally, the DOJ's repeated insistence that it only wants deposition transcripts underscores the disproportionate nature of the relief it seeks to its stated purpose. The meaning it seeks to impute to the Protective Order will grant the DOJ access to all materials produced under that Protective Order. Should this Court clarify or amend the Protective Order to mean what the DOJ wishes it to mean, there is no basis to distinguish between deposition transcripts or any other protected material. The sheer scope of its requested relief makes clear the prejudice that civil

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Plaintiffs' and Defendants' access to discovery for use in the civil cases; what its motion seeks to do here is the exact opposite – expand its own access to civil discovery for use in the criminal cases.

Defendants and other parties will face should the DOJ be given such broad access to MDL discovery. The DOJ's reply makes clear just how disruptive that relief will be on discovery in this MDL and why its motion should be denied.

CONCLUSION

For the reasons previously discussed, Defendants respectfully request that the Court deny the DOJ's Motion.

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2023, I caused a copy of the foregoing to be filed electronically via the Court's electronic filing system. Those attorneys who are registered with the Court's electronic filing system may access this filing through the Court's system, and notice of this filing will be sent to these parties by operation of the Court's electronic filing system.

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